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8 Attorneys for Defendant and Counterclaimant
 9 FAIRCHILD SEMICONDUCTOR CORPORATION

10 UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12 SAN FRANCISCO DIVISION

13
 14 ALPHA & OMEGA SEMICONDUCTOR,
 INC., a California corporation; and
 15 ALPHA & OMEGA SEMICONDUCTOR,
 LTD., a Bermuda corporation,

16 Plaintiffs and Counterdefendants,

17 v.

18 FAIRCHILD SEMICONDUCTOR
 19 CORP., a Delaware corporation,

20 Defendant and Counterclaimant.

21 Case No. C 07-2638 JSW (EDL)
 (Consolidated with Case No. C 07-2664 JSW)

22
**23 FAIRCHILD SEMICONDUCTOR
 CORPORATION'S OPPOSITION TO
 PLAINTIFFS' MOTION FOR A
 PROTECTIVE ORDER TO PROHIBIT
 DISCLOSURE OF CONFIDENTIAL
 INFORMATION TO DR. RICHARD A.
 BLANCHARD**

24 Date: December 18, 2007
 Time: 9:00 a.m.
 Ctrm: Courtroom E, 15th Floor
 Judge: Hon. Elizabeth D. Laporte

25
 26 AND RELATED COUNTERCLAIMS.
 27
 28

1 **I. INTRODUCTION**

2 Dr. Richard A. Blanchard is a well-known expert in power MOSFET technology, the technical
 3 field at issue in this case. He has decades of relevant industry experience, holds more than 130
 4 patents, has published technical books and articles, and holds a Ph.D. in electrical engineering from
 5 Stanford University. For this reason, Fairchild Semiconductor Corporation (“Fairchild”) retained
 6 Dr. Blanchard to testify as an independent expert in this case on technical issues, including
 7 infringement and validity for the patents-in-suit. In addition to his technical background, he is
 8 particularly well-qualified to serve as an expert witness because he has served in that capacity in many
 9 cases in the past. His background and experience will therefore be highly useful to the Court in
 10 assessing the complex technical issues in this case.

11 Alpha & Omega Semiconductor, Inc., and Alpha & Omega Semiconductor, Ltd., (collectively,
 12 “AOS”), however, seek to stop Dr. Blanchard from testifying. Through its present motion, AOS is
 13 trying to block Dr. Blanchard’s access to confidential information¹ in an effort to undercut his ability
 14 to testify on key technical issues in the case. AOS is making this motion for a simple reason – they
 15 know Dr. Blanchard is an outstanding expert and do not want the Court and Fairchild to benefit from
 16 his expertise.

17 Long before the present case, AOS became familiar with Dr. Blanchard’s expertise in
 18 connection with a patent infringement case based on inventions he developed. By taking his
 19 deposition in that case, AOS learned about his technical experience and expertise, and also gained
 20 first-hand experience with his ability to testify about technical issues. Dr. Blanchard plainly
 21 impressed AOS, because once the present action commenced, AOS contacted him about the
 22 possibility of becoming their expert. If he had accepted the engagement, he would have needed to
 23 review AOS’s confidential information in connection with his work on the case, which AOS obviously
 24 thought was acceptable at that time. He declined, though, because Fairchild had already retained him.
 25 Ever since Dr. Blanchard rejected AOS’s invitation to work with them, AOS has been on a campaign

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 27 ¹ In this brief, the term "confidential information" refers to information designated as "Highly
 Confidential - Attorneys' Eyes Only" or "Confidential" under the Protective Order.
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1 to keep him from working on this case by barring his access to AOS's confidential information. For
 2 the reasons set forth below, AOS's motion should be denied.

3 Dr. Blanchard should be permitted to review AOS's confidential information because there is
 4 no risk that he will misuse the information. He has agreed to comply with the Protective Order in this
 5 case and has a long history of abiding by Protective Orders and confidentiality agreements. Further,
 6 his access is necessary and appropriate because he possesses unique expertise in the field of
 7 technology which is central to this case. His review of confidential information will permit him to
 8 utilize his technical expertise as an expert witness to assist the parties and the Court to understand and
 9 resolve key issues of patent infringement, validity, and other issues in this case. For these reasons,
 10 Dr. Blanchard should be allowed to review AOS's confidential information.

11 Despite these facts, AOS objects to Dr. Blanchard on the grounds that his consulting work and
 12 patents allegedly create a risk that he will misuse AOS's confidential information. For the reasons set
 13 forth below, AOS's arguments are without merit. Fairchild therefore respectfully requests that AOS's
 14 motion be denied and that Dr. Blanchard be permitted to review AOS's confidential information.

15 **II. BACKGROUND**

16 This is an action involving patent infringement claims both by AOS against Fairchild and by
 17 Fairchild against AOS. All of the accused products in the action relate to power metal oxide
 18 semiconductor field effect transistors ("power MOSFETs"). A power MOSFET is essentially a
 19 switch. In simple terms, when the switch is turned on by applying voltage to a "gate," the device
 20 allows current to flow through a "channel" in the device (from the "source" to the "drain").
 21 Conversely, when the gate is turned off, the device does not allow current to flow through the device.
 22 This action includes issues of patent infringement and validity, all of which relate to particular designs
 23 for power MOSFET devices.

24 Due to the technical complexity of this case, Fairchild plans to present expert testimony to
 25 explain, among other things, the background of the technology, how a person of ordinary skill in the
 26 art would interpret the claim language of the patents-in-suit, why AOS infringes valid claims of
 27 Fairchild's patents-in-suit, and why the claims of AOS's patents-in-suit are not infringed and are
 28 invalid. Fairchild retained Dr. Blanchard to testify on these topics and others due to his unique

1 expertise and experience in the power MOSFET industry.

2 Dr. Blanchard has over 35 years of experience in the semiconductor and electronics industries.
 3 (Declaration of Dr. Richard A. Blanchard in Support of Fairchild's Opposition to Plaintiff's Motion for
 4 a Protective Order ("Blanchard Decl."), ¶ 3). Additionally, he has testified in court and in deposition
 5 on numerous occasions as an expert witness, and has also served as an arbitrator and as a court-
 6 appointed special master. (Blanchard Decl., ¶ 4). He has published several books and numerous
 7 articles on semiconductor design and process development, as well as failure analysis. (Blanchard
 8 Decl., ¶ 4). He also holds more than 130 U.S. patents on semiconductor technology, and is a member
 9 of the Institute of Electrical and Electronic Engineers, the Electrostatic Discharge Society, and the
 10 International Microelectronics and Packaging Society. (Blanchard Decl., ¶ 4). Many of his patents
 11 and published articles relate to power MOSFET technology. (Blanchard Decl., ¶ 5). He received a
 12 Ph.D in electrical engineering from Stanford University, as well as bachelor's and master's degrees in
 13 electrical engineering from the Massachusetts Institute of Technology. (Blanchard Decl., ¶ 2).
 14 Dr. Blanchard's doctoral thesis was on the subject of breakdown mechanisms in power MOSFET
 15 devices, which is one of the key issues in this action. (Blanchard Decl., ¶ 2). In sum, his background
 16 and experience render him uniquely suited to testify concerning technical issues in this action.

17 **III. LEGAL STANDARD**

18 When a designating party – here, AOS – objects to a proposed disclosure of confidential
 19 information, a court must balance the receiving party's "interest in electing the experts most beneficial
 20 to its case" against the designating party's "interest in protecting its trade secrets from disclosure to
 21 competitors."² *Advanced Semiconductor Materials America Inc. v. Applied Materials, Inc.*, 43
 22 U.S.P.Q.2d 1381, 1384 (N.D. Cal. 1996); *see also Telular Corp. v. Vox2, Inc.*, 2001 WL 641188, *1
 23 (N.D. Ill. 2001) (same). The receiving party has a strong interest in maintaining its choice of experts,
 24 and the designating party cannot hold "the power of veto over its adversary's choice of experts."

25 _____
 26 ² The term "designating party" refers to the party that designated the information as confidential under
 27 the Protective Order. The term "receiving party," in contrast, is the party that received the information
 that the designating party designated as confidential.

1 *Advanced Semiconductor*, 43 U.S.P.Q.2d at 1384. The court will also consider the specific expertise
 2 of the consultant and whether other consultants possess similar expertise. *Id.* (expert had
 3 qualifications "other designated experts may not possess"); *see also Nellson Northern Operating, Inc.*
 4 *v. Elan Nutrition, LLC*, 238 F.R.D. 544, 547 (D. Vt. 2006) (expert's experience is "of unique
 5 relevance" to the case).

6 Absent "compelling reasons" to the contrary, a receiving party "must be permitted to present
 7 the experts who it believes possess the ability to convey highly technical information to lay persons,
 8 and those experts must be permitted access to confidential information." *Advanced Semiconductor*, 43
 9 U.S.P.Q.2d at 1384; *see also Nellson*, 238 F.R.D. at 547 (rejecting designating party's suggestion that
 10 the receiving party should use an "expert who does not currently work" in the relevant industry). The
 11 receiving party "must have latitude to choose the experts that it believes have the necessary expertise
 12 and ability to convey highly technical information to the Court." *Nellson*, 238 F.R.D. at 547.

13 Moreover, to preclude access the designating party has the burden to make two showings:
 14 First, the designating party must show that the information disclosed would be useful to their
 15 competitors; second, the designating party must show that the receiving party's expert is in a position
 16 that would allow the information to be exploited by competitors. *U.S. Gypsum Co. v. Lafarge North*
 17 *America, Inc.*, 2004 WL 816770, *1 (N.D. Ill. 2004). Fear alone that the expert will consult in the
 18 industry in the future and inadvertently misuse the designating party's confidential information is not
 19 sufficient competitive injury that outweighs the receiving party's strong interest in selecting the most
 20 suitable expert. *Advanced Semiconductor*, 43 U.S.P.Q.2d at 1384; *see also Telular*, 2001 WL 641188,
 21 *3-4 ("unsubstantiated fear" that expert "may compete with [the designating party] in the future is not
 22 sufficient to demonstrate risk of competitive injury to [the designating party] that outweighs [the
 23 receiving party's] right to the expert of its choice").

24 **IV. ARGUMENT**

25 **A. Dr. Blanchard Has A Long History Of Properly Maintaining Confidential**
 26 **Information**

27 Dr. Blanchard's access to confidential information is appropriate because he has a long history
 28 of complying with Protective Orders and other confidentiality agreements. Over the past five years,

1 he has worked on more than 50 consulting matters and has signed confidentiality agreements for
 2 virtually every engagement. (Blanchard Decl., ¶ 9). He has never been accused of breaching any of
 3 those agreements. (Blanchard Decl., ¶ 11). Similarly, he agreed to be bound by several Protective
 4 Orders in other cases, including at least three in the past five years, and he never violated the terms of
 5 those orders. (Blanchard Decl., ¶¶ 10-11). Here, Dr. Blanchard has signed the undertaking for the
 6 Protective Order entered in this case and thus (1) agreed that he will be bound by all terms of the
 7 Protective Order; (2) acknowledged that failure to comply could result in sanctions and punishment in
 8 the form of contempt; and (3) solemnly promised to not disclose in any manner any information or
 9 item that is subject to the Protective Order to any person or entity except in strict compliance with the
 10 terms of the Protective Order. (Blanchard Decl., ¶ 10). In view of Dr. Blanchard's agreement to be
 11 bound by the Protective Order in this case and his long, flawless track record of maintaining
 12 confidential information of others, AOS's alleged concerns about Dr. Blanchard's ability to do the
 13 same in this case are unfounded.

14 **B. Dr. Blanchard Should Have Access to Confidential Information Because**
 15 **His Expertise Is Uniquely Relevant To This Case**

16 In addition to the reasons set forth above, Dr. Blanchard should be given access to confidential
 17 information because he is uniquely qualified to testify in the present case. He is an expert in power
 18 MOSFET technology - the same technology at issue in this case. As set forth above, he has many
 19 years of experience in the field and therefore has expertise which is highly relevant to the issues in this
 20 case. Indeed, he is a named inventor on many patents relating to power MOSFET technology, and has
 21 also co-authored several technical articles in the field. (Blanchard Decl., ¶ 5). The relevance of his
 22 prior work to the issues in this case is beyond any reasonable dispute. In fact, the U.S. Patent and
 23 Trademark Office ("PTO") considered Dr. Blanchard's prior work (e.g., his patents and technical
 24 articles) during the prosecution of many of the patents-in-suit. (Blanchard Decl., ¶ 13). In other
 25 words, the PTO reviewed Dr. Blanchard's work as evidence of the knowledge in the power MOSFET
 26 field when the PTO decided whether to issue the patents-in-suit. Due to Dr. Blanchard's expertise
 27 described above, he is uniquely qualified to offer opinions relevant to the technical issues in this case,
 28 including patent infringement and validity. *See Nellson Northern Operating, Inc. v. Elan Nutrition,*

1 *LLC*, 238 F.R.D. 544, 547 (D. Vt. 2006) (granting access to confidential information because expert's
 2 experience was "of unique relevance" to the case).

3 To fully use his unique qualification in this case, however, Dr. Blanchard must be able to
 4 review confidential information, including process flows, process recipes, simulations, testing data,
 5 and other technical information. Fairchild expects to use these types of documents, among other
 6 things, to establish that AOS infringes Fairchild's patents-in-suit. Accordingly, Dr. Blanchard must be
 7 able to review these documents and other information in order to testify concerning technical issues in
 8 the case. For these reasons, Fairchild therefore respectfully requests that he be permitted to review
 9 confidential information.

10 **V. AOS'S ALLEGED CONCERNS ABOUT DR. BLANCHARD ARE MERITLESS**

11 As demonstrated above, Dr. Blanchard has expertise which makes him uniquely qualified to
 12 offer opinions in this case. Moreover, his extensive history of reviewing and maintaining confidential
 13 information of others ensures there is no legitimate concern that AOS's confidential information will
 14 be misused. Despite these facts, AOS decided to file the present motion and seeks to preclude
 15 Dr. Blanchard from reviewing its confidential information and thereby bar him from serving as an
 16 expert in this case. As demonstrated below, AOS's arguments are without merit.

17 As a threshold matter, all of AOS's alleged concerns about Dr. Blanchard are undercut by the
 18 fact that AOS attempted to retain Dr. Blanchard to serve as its expert in this case. Before AOS was
 19 aware that Fairchild had retained Dr. Blanchard, AOS contacted and asked him if he was willing to
 20 serve as an expert for AOS. (Blanchard Decl., ¶ 12). He, of course, declined because he was
 21 previously retained by Fairchild. (Blanchard Decl., ¶ 12). AOS's attempt to retain Dr. Blanchard,
 22 however, demonstrates that it had no concern about his ability to properly maintain confidential
 23 information, as he would have needed to review AOS's confidential information if he were retained by
 24 AOS. AOS only manufactured some objections once they learned that Fairchild had retained
 25 Dr. Blanchard, and suddenly claimed he was unacceptable and should not review confidential
 26 information. AOS's squarely inconsistent position demonstrates that its alleged concerns are not
 27 legitimate, but rather are fabricated in an effort to preclude Fairchild and this Court from benefiting
 28 from Dr. Blanchard's expertise.

1 In any event, AOS's specific arguments are meritless. AOS argues, for example, that
2 Dr. Blanchard's current consulting work in the power MOSFET industry create a risk of competitive
3 harm to AOS, because Dr. Blanchard may knowingly or unknowingly misuse AOS's confidential
4 information. (Memorandum of Points and Authorities in Support of Plaintiff's Motion for a Protective
5 Order ("Brief"), p. 4). Contrary to AOS's arguments, however, Dr. Blanchard's consulting activities
6 pose no such risk.

7 As discussed above, Dr. Blanchard has agreed to be bound by the terms of the Protective Order
8 in this action, and he therefore will not use any of AOS's confidential information in connection with
9 any of his work outside of the present case. In view of his long track record of respecting confidential
10 information, his agreement to be bound by the Protective Order is sufficient to protect AOS's
11 confidential information. Accordingly, AOS has presented no reason to believe that Dr. Blanchard
12 would ever knowingly violate the Protective Order.

13 Further, AOS has failed to establish there is a risk of Dr. Blanchard inadvertently disclosing
14 AOS's confidential information in the course of his consulting work. Other than Dr. Blanchard's
15 litigation work for Fairchild, he currently consults for only two companies concerning power
16 MOSFET technology. (Blanchard Decl., ¶ 7). His work for those companies is limited to intellectual
17 property issues. (Blanchard Decl., ¶ 7). On behalf of one company, he assists them in evaluating their
18 own patents and inventions, as well as patents owned by others. He also assists in the development of
19 the company's intellectual property. (Blanchard Decl., ¶ 7). Similarly, in his consulting work for
20 another company, he also assists in the development of their intellectual property.

21 AOS has failed to meet its burden of establishing that these consulting activities create a
22 sufficient risk of competitive harm such that his access to confidential information should be denied.
23 AOS has provided no specific reasons for why Dr. Blanchard may misuse the information he learns in
24 this action in connection with his other work. The reason for this failure is simple - there is **no** risk of
25 misuse. Dr. Blanchard's current consulting work in the power MOSFET field is limited in scope and
26 is designed to ensure that he does not have a conflict of interest. Indeed, Dr. Blanchard actively
27 screens potential engagements to avoid any conflict problems. (Blanchard Decl., ¶ 8). Consequently,
28 there is no risk that he would inadvertently misuse any confidential information he learns in this case

1 in connection with his other consulting work. (Blanchard Decl., ¶ 8). Moreover, his outstanding track
 2 record of properly protecting confidential information of others demonstrates that he is capable of
 3 protecting AOS's confidential information. In short, AOS has failed to establish there is any
 4 meaningful risk of harm to AOS if Dr. Blanchard has access to its confidential information. The mere
 5 fact that he currently consults in the power MOSFET industry is an insufficient reason to bar his
 6 access to confidential information. *See Advanced Semiconductor Materials America Inc. v. Applied*
 7 *Materials, Inc.*, 43 U.S.P.Q.2d 1381, 1384 (N.D. Cal. 1996) (holding that a party cannot successfully
 8 object to an expert simply because the expert is an "active industry consultant").

9 AOS also argues that Dr. Blanchard's access to confidential information should be denied
 10 because he is a prolific inventor and is a named inventor on many patents and patent applications.
 11 (Brief, pp. 4-6). AOS, however, fails to explain why this fact creates a risk that Dr. Blanchard will
 12 misuse AOS's confidential information. To the extent they contend he may seek patents covering
 13 AOS's products and processes, the argument should be rejected for the same reasons discussed above.
 14 In particular, Dr. Blanchard's agreement to be bound by the Protective Order in the present case, as
 15 well as his long track record of dealing with confidential information properly, ensures that his work
 16 in developing patents does not create a risk of competitive harm to AOS. To the extent that AOS
 17 objects to Dr. Blanchard simply because he has patents in a relevant field, AOS's argument should be
 18 rejected as it would disqualify any expert, like Dr. Blanchard, who has been awarded patents due to
 19 the expert's significant contributions to the field. If AOS's argument were taken to its logical
 20 conclusion, the only persons who could serve as experts would be ones who have **no** patents, **no**
 21 consulting work, and, in short, **no** relevant experience at all. This argument defies logic and should be
 22 rejected. *AOS's argument is also belied by the fact that AOS's own expert is a named inventor on*
 23 *power MOSFET patents and patent applications which are owned by a competitor in the industry.*
 24 (Declaration of Matthew R. Hulse in Support of Fairchild's Opposition to Plaintiff's Motion for a
 25 Protective Order ("Hulse Decl."), Exh. 5). Despite this fact, AOS has asserted that its expert should be
 26 permitted to access Fairchild's confidential information. (Hulse Decl., Exh. 6). AOS has failed to
 27 explain why it believes its expert should be given access - and Dr. Blanchard should not - even though
 28 they both have been involved in developing patents in the power MOSFET industry. (Hulse Decl.,

1 Exh. 7). AOS's inconsistent position demonstrates their objection to Dr. Blanchard is baseless.

2 AOS further argues that Dr. Blanchard's access should be denied because discovery is at an
 3 early stage and Fairchild has retained another technical consultant. (Brief, p. 6). The gist of AOS's
 4 argument appears to be that Fairchild will not be prejudiced if it cannot use Dr. Blanchard as an expert
 5 because Fairchild has already retained another technical consultant, and it has time to retain others if
 6 necessary. The flaw in this argument is that, as demonstrated above, Dr. Blanchard has unique
 7 expertise which will be very difficult, if not impossible, to find in other experts. He has more than 35
 8 years of experience in the semiconductor industry, has published several books on semiconductor
 9 design and process development, is a named inventor on over 130 patents (including many relating to
 10 power MOSFET technology), and has a Ph.D. in electrical engineering from Stanford University.
 11 (Blanchard Decl., ¶ 2). Additionally, his own patents and publications are cited references on many of
 12 the patents-in-suit in this case. (Blanchard Decl., ¶ 13). In other words, Dr. Blanchard is uniquely
 13 qualified to testify about the technical issues in this case.

14 It will be very difficult to find another expert with Dr. Blanchard's level of technical expertise
 15 relevant to this case. Although Fairchild has retained another person, Dr. Krishnaswamy, as a
 16 technical consultant, she lacks the depth of Dr. Blanchard's expertise and experience in the power
 17 MOSFET industry, has no prior testimonial experience as an expert consultant in patent litigation, and
 18 will not testify as an expert in this case. Accordingly, AOS's suggestion that Dr. Blanchard can be
 19 replaced easily is without merit.

20 Finally, AOS argues that Dr. Blanchard's access should be denied because he has not disclosed
 21 all of his consulting activities for the past five years. (Brief, p. 6). Contrary to AOS's argument, this
 22 fact should not bar him from accessing AOS's confidential information.

23 Fairchild has disclosed all of Dr. Blanchard's current activities which are relevant to this case.
 24 Specifically, Fairchild has disclosed all of Dr. Blanchard's current consulting activities in the power
 25 MOSFET field. (Blanchard Decl., ¶ 7). Because virtually all of AOS's confidential information
 26 relates to power MOSFET technology, the information Dr. Blanchard has disclosed about his
 27 consulting work is sufficient to assess whether there would be any problems for him to access AOS's
 28 confidential information. Nevertheless, Dr. Blanchard has also disclosed every case in which he has

1 testified as an expert or consultant in the past five years, and has also provided a detailed resume and a
 2 list of all of his patents and publications. (Blanchard Decl., Exh. 1).

3 Dr. Blanchard is unable to provide further information about his prior consulting activities
 4 because he has confidentiality agreements with his clients, and therefore is unable to disclose his work
 5 without permission. (Blanchard Decl., ¶ 9). Given that he has worked on over 50 matters in the past
 6 five years, it is simply not feasible for him to obtain permission from all of his former clients to
 7 disclose his work to AOS. (Blanchard Decl., ¶ 9). He has, however, received permission from his
 8 current clients in the power MOSFET field so that he was able to disclose to AOS his current work in
 9 the industry. (Blanchard Decl., ¶ 9).

10 In sum, Dr. Blanchard has disclosed sufficient information for AOS and the Court to properly
 11 assess whether he should have access to confidential information. His prior work is simply irrelevant
 12 to the issue of whether there is a risk he may misuse confidential information presently or in the
 13 future. AOS's position that it needs to know Dr. Blanchard's prior consulting work is undercut by the
 14 fact that AOS, in a prior case, did not believe such information was relevant at all to evaluate
 15 protective order issues. Specifically, when AOS was involved in a patent infringement action against
 16 Siliconix, AOS agreed to a Protective Order in which experts did not need to disclose *any* information
 17 about the expert's prior work to be approved under the Protective Order. (Hulse Decl., Exh. 1 at p. 7
 18 (section 4.1)). Instead, AOS's Protective Order merely required the expert to disclose his or her name,
 19 address, present employer, title, resume, and a signed undertaking for the Protective Order. (Hulse
 20 Decl., Exh. 1 at p. 7 (section 4.1)). Given that Dr. Blanchard's disclosure about his background and
 21 experience far exceeds the disclosure required from AOS's Protective Order in the prior case, AOS's
 22 objection based on the scope of Dr. Blanchard's disclosure is disingenuous and should be rejected.

23 **VI. CONCLUSION**

24 For the foregoing reasons, Fairchild respectfully requests that the Court deny AOS's motion for
 25 a protective order, and permit Dr. Blanchard to have access to AOS's confidential information.

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1 DATED: November 27, 2007

Respectfully submitted,

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3 By: /s/Igor Shoiket

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